SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
SEP 23 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 367

CITY OF LONG BEACH, a municipal corporation, SIGURD A. OUGLAND, and J. A. JACOBSEN & COMPANY, INC., a corporation,

Petitioners,

vs.

NATIONAL DEVELOPMENT COMPANY, a corporation, *et al.,*

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM A. C. ROETHKE,
634 South Spring Street,
Los Angeles 14, California,
Attorney for Respondent, National Development Company.

Of Counsel:
LILLICK, GEARY, MCHOSE,
ROETHKE & MYERS,
KENNETH E. KULZICK.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Statement of the case 2

Argument 6

All of the questions for review as framed by the petitioners are predicated upon false assumptions and partially stated facts 6

1. "May a ship with an improper lookout, a statutory fault, ever be relieved of the burden of proving '* * * not merely that her fault might not have been one of the causes or that it probably was not, but that it cannot have been'? The Pennsylvania (19 Wall. 125, 86 U. S. 148)" 6

2. "Does a finding of fact stating, 'There was no fault upon the part of DONA AURORA or the agents, servants or employees of libelant which caused or contributed to the grounding,' with no evidence to support a stronger finding, present that degree of proof required by The Pennsylvania (19 Wall. 125, 86 U. S. 148)?" 8

3. "Is a ship master, his ship in thick fog, who by radar 'lookout' observes his ship to be on a collision course, ever excused from failure to warn the pilot, or acting to save his ship? No ground rules by this court yet exist covering this situation" 9

4. "Did this court intend the 'clearly erroneous' rule in McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to restrict an appellate court's review of a finding based on evidence by deposition and exhibit?" 10

PAGE

5. "Did this court intend the 'clearly erroneous' rule of McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to restrict an appellate court's review of conclusions of law, although labeled findings, or prevent it from remanding the case for additional findings, or making its own findings?" 11

6. "May the rule announced by the Ninth Circuit in The President Van Buren (223 F. 2d 853, 1955 A. M. C. 1294) be extended into non-pilotage waters and make a municipality liable for the acts of its pilots beyond its boundaries and in waters for which the pilot is not licensed, and waters for which no pilot's license is authorized or obtainable?" 12

Conclusion 14

TABLE OF AUTHORITIES CITED

CASES PAGE

Bertel v. Panama Transport Co., 202 F. 2d 247 ..... 10, 11

McAllister v. United States, 348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999 10

The Pennsylvania, 19 Wall. 125, 86 U. S. 148 ..... 7, 8

The President Van Buren, 223 F. 2d 853, 1955 A. M. C. 1294 ..... 11, 12

IN THE

Supreme Court of the United States

October Term 1961

No. .....

City of Long Beach, a municipal corporation, Sigurd A. Ougland, and J. A. Jacobsen & Company, Inc., a corporation,

Petitioners,

vs.

National Development Company, a corporation, *et al.,*

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This brief in opposition to the Petition for Writ of Certiorari is undertaken because Petitioners have failed to present an accurate summary of the facts as found by the trial court and reviewed by the Court of Appeals for the Ninth Circuit. Rather, Petitioners have presented several general and largely undisputed propositions of law, misapplied to partial, over-simplified, and often misstated, "facts". The many signif-

icant omissions of fact leave a distorted picture, from which errors in application of law can readily be created. If the facts are truly presented, as they were considered by the courts below, there are no significant legal questions for this Court to consider. Perhaps most critically, Petitioners have misconstrued even the Findings of Fact of the trial court and have also failed to present an accurate picture of the review by the Court of Appeals in affirming the trial court's judgment.

Statement of the Case.

Petitioners begin their purported factual summary with the following statement (Pet. Br. p. 6):

> "The following statement resolves all facts on which true Findings were made, in favor of libelants, National Development Company, a corporation, et al."

This proclamation is demonstrably false. Its falsity can be seen in any fair comparison between the Findings of Fact, as reviewed by the Court of Appeals, and Petitioners' statement. They bear little resemblance in real substance.

Petitioners begin their purported statement with an inadvertent error as to the date of the event—it was August 29, 1955, not August 19—and proceed to select such few facts as do not indicate the actions of Long Beach Municipal Port Pilot Ougland, and the impressions which Pilot Ougland created concerning his activities.

For example, Petitioners state (Pet. Br. p. 6):

> "On the morning of August 19, 1955, (*sic*) the Philippine M/V 'DONA AURORA', owned

by Libelant, National Development Company, lay in the open sea approximately one mile off the seaward entrance to Long Beach Harbor, California. A port pilot employed by J. A. Jacobsen & Company, Inc., and furnished by the City of Long Beach, federally licensed for 'San Pedro Bay and Tributaries' only, had been ordered by the ship.

"The pilot boarded the ship where she lay in territorial waters outside the harbor. Fog, patchy to heavy, was present."

By way of contrast, as stated by Circuit Judge Hamlin, speaking for a unanimous Court of Appeals (Appendix, Opinion of the Ninth Circuit, pp. 2 and 3):

"From the evidence and the findings of the district court certain salient facts are established. During the early morning of August 29, 1955, the master of the DONA AURORA, Captain Baura, requested the services of a pilot in order that he might enter Long Beach Harbor. When the ship arrived outside the harbor, shortly before 7 a.m., the pilot boat was not in view, so Captain Baura waited near the entrance buoy. At about 7 a.m. *Captain Ougland, a Long Beach municipal port pilot*, boarded the Long Beach pilot boat and started out to the DONA AURORA. Between the pilot station and the breakwater entrance the pilot boat encountered fog, and in accordance with his previous standing orders, *Captain Ougland arranged to have Captain Jacobsen summoned to the pilot station on shore so that the shore based radar would be operative if it should be needed.*" (Italics supplied.)

It should be noted that Petitioners were careful to eliminate mention of the arrangements for the use of the Long Beach shore-based radar, undertaken prior to the Municipal port pilot's boarding the vessel. After placing Pilot Ougland aboard the ship, the Petitioner's summary merely states (Pet. Br., p. 6):

> "A discussion was had between pilot and master concerning bringing the ship into Long Beach, the decision being to proceed toward the Harbor."

This purported summary should again be compared with the actual testimony of Captain Baura, as set forth in the Court of Appeals' opinion. (Appendix, Opinion of the Ninth Circuit, pp. 2 and 3.) In short, the decision to enter was predicated upon Pilot Ougland's assurances to the DONA AURORA's Master that it was safe to enter, using the shore-based radar. This significant testimony, even in summary form, is carefully avoided by Petitioners.

We might note the significant failure of Petitioners to point out Pilot Ougland's having assumed the conn of DONA AURRORA, *i.e.*, the control of the navigational movement of the vessel, anywhere in their "summary of facts." The impression given is that Long Beach Municipal Port Pilot Ougland was merely another person on the bridge. But, as the Court of Appeals noted (Appendix, Opinion of the Ninth Circuit, Page 3):

> "The district court found that the pilot assumed the conn of the ship, thereafter gave all course and engine orders and was in charge of the navigation and movement of the ship until it grounded on the Long Beach breakwater some fifteen minutes later."

It is interesting indeed to compare the Findings of the District Court, and the Court of Appeals' review of those Findings and evidence, with the three-page statement of Petitioners. Perhaps Petitioners seek to avoid the impact of the Findings and supporting evidence by their statement (Pet. Br. p. 8):

> "The trial court found the respondent pilot negligent in many particulars with which we are not now concerned and do not here dispute."

However, in ignoring all of the Findings, as they relate to the liability of Pilot Ougland and Long Beach pilotage facilities, Petitioners apparently also believe that they can ignore any portion of the factual picture surrounding the casualty which concerns the pilot and pilotage facilities. This removes from the factual picture the man who was found to be in control of the navigation and movement of the vessel, whose every action, and inaction concerning the equipment he neglected to use, critically influenced and controlled the course of events leading to the grounding.

Petitioners' summary also misstates the Findings as they relate to the vessel and her crew. The trial court not only found that there was no contributing fault on the part of DONA AURORA, but also found in an express affirmative finding that the vessel was properly equipped and supplied and manned by a competent crew. [Finding 18.] Apparently the construction of Petitioners would expect a trial judge to make an express finding on each individual essential piece of equipment and each individual crew member. Such is, of course, absurd.

Respondents respectfully refer the Court to the full Findings of the trial judge and to the full opinion of the Court of Appeals.

ARGUMENT.

ALL OF THE QUESTIONS FOR REVIEW AS FRAMED BY THE PETITIONERS ARE PREDICATED UPON FALSE ASSUMPTIONS AND PARTIALLY STATED FACTS.

Before treating each question individually, Respondents must note that by repetition Petitioners again seek to cast this case into a different set of circumstances and state of facts than found by the courts below. Petitioners frame their questions, based upon their partial statement and misstatement of fact, and then proceed to demolish their strawmen. Petitioners' contentions of faulty lookout and miscellaneous alleged faults by the master and others have been twice considered and rejected. In the face of this, to assume, as Petitioners do, that their contentions are now properly found as facts, upon which errors of law can be predicated, completely misstates the record in this case. Petitioners' first question assumes findings *not* made on the subject of lookout

1. **"May a Ship With an Improper Lookout, a Statutory Fault, Ever Be Relieved of the Burden of Proving '* * * Not Merely That Her Fault Might Not Have Been One of the Causes or That It Probably Was Not, but That It Cannot Have Been'? The Pennsylvania (19 Wall. 125, 86 U. S. 148)."**

Petitioners' question as framed is loaded, and the answer is, of course, "No," since the simple statement of the proposition contains its own answer. The fact is, however, that such a question is not present in this case since neither the trial court nor the Court of Appeals found the lookout to have been improper. The

question ignores the substantial evidence supporting the finding of the trial judge that there was no vessel or crew deficiency [Finding 18] and no fault on the part of DONA AURORA or the agents, servants or employees of libelant which caused or contributed to the grounding. [Finding 17.] This substantial evidence was also considered by the Court of Appeals. There is no need to reaffirm the rule of *The Pennsylvania*, 19 Wall. 125, 86 U. S. 148, because that rule stands unaffected by this case. The contentions in regard to the lookout were not only thoroughly considered by the trial court prior to making Findings 17 and 18, but also were thoroughly reviewed by the Court of Appeals.

The substantial evidence that the lookout on DONA AURORA on the morning of August 29, 1955 was entirely proper may best be summarized by a complete reading of the Court of Appeal's opinion, reported at 289 F. 2d 586, and contained in Petitioners' Appendix.

The Petitioners' reargument of lookout sufficiency ignores the pilot's in-person testimony which itself established that Pilot Ougland heard the foghorn on the breakwater which he struck and that a lookout report of unidentified horns would have added nothing to the pilot's knowledge. In short, the carefully reviewed testimony establishes beyond doubt that DONA AURORA was properly manned by a competent crew. As the Court of Appeals noted, the pilot himself, in his report to the United States Coast Guard, (made within a few days after the grounding) made no complaint of improper lookout.

2. **"Does a Finding of Fact Stating 'There Was No Fault Upon the Part of DONA AURORA or the Agents, Servants or Employees of Libelant Which Caused or Contributed to the Grounding,' With No Evidence to Support a Stronger Finding, Present That Degree of Proof Required by The Pennsylvania (19 Wall. 125, 86 U. S. 148)?"**

Petitioners' second question again ignores Finding 18 and also assumes the existence of a non-existent statutory fault.

There was no finding of fault which would invoke *The Pennsylvania* rule and so, quite obviously, there was no need for a finding which would decide that the provisions of the rule were met.

Petitioners again misstate the facts when they indicate that the significant evidence upon which the Findings are based was all by deposition. Actually, the principal evidence bearing upon all issues was largely in-person testimony and the trial court had the benefit of observing the principal witnesses testify in open court, that is, Captain Baura, DONA AURORA'S master, Long Beach Pilot Ougland, Chief Pilot Jacobsen, the Long Beach radio expert Lockard and many others.

3. **"Is a Ship Master, His Ship in Thick Fog, Who by Radar 'Lookout' Observes His Ship to Be on a Collision Course, Ever Excused From Failure to Warn the Pilot, or Acting to Save His Ship? No Ground Rules by This Court Yet Exist Covering This Situation."**

This question is most clearly based upon a misapprehension of the facts as found and reviewed by the courts below. It was clear, and the trial court found, that Pilot Ougland was negligent in the manner in which he attempted to employ the vessel's radar. [Finding 14(g).] Ordinary prudence required that the pilot advise the master of his loss of shore-based radar—which he did not do—and, thereafter, request the master to maintain a continuous radar plot. Petitioners' summary ignores the fact that the pilot did not do so [R. 418-419]. Neither did the pilot request the master to give him any bearing from the ship's radar [R. 395]. In fact, according to the testimony of the master, Pilot Ougland never asked for any information from the ship's radar [R. 124]. As a result, as the trial court found, the master was lead to believe that the ship's navigation was being directed by the pilot based on information the pilot received from the shore-based radar station.

In addition to the above testimony, Petitioners omit the testimony in which the pilot stated that he himself looked at the radar three or four times [R. 423] and saw "an outline similar to what you see on the chart here (indicating)". [R. 423.]

Petitioners, in presenting a slanted summary of only part of the testimony, completely ignore the pilot's own admissions and the effect of the pilot's con-

duct upon the vessel's master. The attempt to select and isolate facts without their surrounding circumstances must be condemned.

A review of all of the evidence shows that the failure to use the radar properly falls upon the shoulders of the navigator responsible for the movement of the vessel; that is, Long Beach Municipal Pilot Ougland.

4. "Did This Court Intend the 'Clearly Erroneous' Rule in McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to Restrict an Appellate Court's Review of a Finding Based on Evidence by Deposition and Exhibit?"

The Petitioners attempt to point up some supposed differences of interpretation by the Circuit Courts concerning the proper scope of appellate review when testimony is all by deposition and not in person. The simple answer to this question is that it does not arise in the present case at all. Captain Baura, DONA AURORA'S master, Long Beach Pilot Ougland, Chief Long Beach Pilot Jacobsen, and many other witnesses testified in person and their significant testimony bore upon all the disputed fact questions which Petitioners would seek now to review. Clearly the proposition of the *Bertel* case is inapplicable here, even as the rule quoted by Petitioners clearly shows:

> "* * * Since all of the evidence was documentary or by deposition and the trial judge did not hear or see the witnesses, we are in as good a position as the lower court to evaluate it. Although under these circumstances the 'clearly erroneous' doctrine is not applicable, Panama

Transport Co. v. The MARAVI, 2 Cir., 165 F. 2d 719; Stockes v. United States, 2 Cir. 144 F 2d 82 * * *."

Bertel v. Panama Transport Co., 202 F. 2d 247, 249.

Findings 17 and 18, like all of the trial court's Findings in this matter, are based upon a variety of substantial evidence, both in person, by deposition, and by Coast Guard hearing transcript. A review of the record readily refutes the claims that these Findings are merely based upon depositions or exhibits and shows the significance of the testimony of the principal in-person witnesses on each and every disputed issue of fact.

5. "Did This Court Intend the 'Clearly Erroneous' Rule of McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to Restrict an Appellate Court's Review of Conclusions of Law, Although Labeled Findings, or Prevent It From Remanding the Case for Additional Findings, or Making Its Own Findings?"

As is clearly seen in any fair reading of the Court of Appeals' opinion, that Court did not fail to review the evidence supporting the Findings of Fact. In fact, the opinion of the Court of Appeals contains such a lengthy examination of the facts that it indicates a very detailed and specific examination.

Petitioners are, of course, in error when they state that "Finding 17 is the only finding made by the trial court bearing upon the conduct of the vessel and crew". As has been noted before, Finding 18 is an express finding, relating to vessel and crew and, in

addition, the specific findings concerning the navigational control and actions by Pilot Ougland also bear directly upon the conduct of DONA AURORA and her crew.

The contention of Petitioners that the lookout did not function has been twice rejected. But even more frivolous is the claim that a specific finding of negligence or non-negligence should have been made concerning each act of the vessel's master. There was a specific finding made on the pilot's responsibility for the improper use of the ship's radar under all the circumstances. Since that responsibility was assigned, and correctly, and the supporting evidence for that finding was reviewed, the present complaint of Petitioners is merely another effort to walk away from the facts.

6. "May the Rule Announced by the Ninth Circuit in The President Van Buren (223 F. 2d 853, 1955 A. M. C. 1294) Be Extended Into Non-Pilotage Waters and Make a Municipality Liable for the Acts of Its Pilots Beyond Its Boundaries and in Waters For Which the Pilot Is Not Licensed, and Waters for Which No Pilot's License Is Authorized or Obtainable?"

This question completely misconstrues the basis of liability on both the *President Van Buren*, 223 F. 2d 853, 1955 A. M. C. 1294 and the present case. Petitioner City of Long Beach contracted to provide competent pilotage and the City directly collected the fees for pilotage. Petitioner City of Long Beach tendered its pilotage services at the arrival buoy, one mile south of the Long Beach Harbor breakwater entrance. The services tendered were not di-

vided in terms of so much for "territorial waters" and so much for "pilotage waters". In short, the very services undertaken were to bring the vessel *safely* into port, which obviously included transiting the breakwater entrance. The absurdity of Petitioners' position is demonstrated by their statement (Pet. Br., p. 21):

> "* * * We agree that it might be inconvenient to change pilots at the imaginary dividing line between harbors. * * *"

There is no confusion of law in this regard. The thrust of the court's Findings and the thrust of the *PRESIDENT VAN BUREN* is that the place where pilotage properly begins is a question of fact and contract. The attempt to withdraw the pilotage services beyond the breakwater entrance is untenable. Most absurd is the statement (Pet. Br., p. 22):

> "A Long Beach municipal pilot could board a ship anywhere in the vast reaches of the Pacific Ocean, and as long as the ship was destined for Long Beach as its next port of call, Long Beach would be liable for the acts of the pilot while assisting."

The answer to this cry of alarm is simple: Long Beach would only be liable if the service the City of Long Beach proffered and negligently performed was pilotage across the ocean. In the present case the City of Long Beach proffered its pilotage services when the Long Beach pilot boat met DONA AURORA in the vicinity of the Long Beach Harbor arrival buoy. This is the place where the U. S. Coast Pilot, the official United States Government publication, carried aboard DONA AURORA, advises the

foreign shipmaster that he will meet the Long Beach pilot [R. 177]. Obviously, it is within the power of the City of Long Beach to tender its pilotage services at a place of its choice. However, as found by the trial court, the assumption of the conn of a vessel outside of the restricted breakwater entrance by a local pilot, is a matter of sound seamanship, and is the fact.

Conclusion.

Municipal pilotage is under no threat from this decision. Incompetent and dangerous pilotage is all that was condemned. The present petition merely represents another attempt by the Petitioners to walk away from the facts. This effort has been twice rejected, after most thorough review, by the trial court and the Court of Appeals. The purported "questions presented for review" are framed in terms of misconstruction of the facts, as found and reviewed by the courts below, and are not properly presented here. The Petitioners have misapplied pedestrian propositions of law that need no review.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Date: September 22, 1961.

Respectfully submitted,

WILLIAM A. C. ROETHKE,
Attorney for Respondent, National Development Company.

Of Counsel:

LILLICK, GEARY, MCHOSE,
ROETHKE & MYERS,
KENNETH E. KULZICK.